Supreme Court, U.S.
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No.

In the
SUPREME COURT of the UNITED STATES

JOHN PATRICK ROSCH,

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON,

Respondents.

On Petition for Writ of Certiorari
To The Court of Appeals of the State of
Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does RCW 69.50.505 violate the due process clause of the Fifth and Fourteenth Amendments in that it authorizes the Sheriff or his designee to adjudicate forfeiture hearings and provides, in the event a forfeiture is ordered, that the Sheriff may keep the property or sell it and keep 90% of the forfeited proceeds?

2. Does RCW 69.50.505 also violate due process, the separation of powers doctrine and the Fourth amendment, in that it authorizes the Sheriff or his designee to adjudicate forfeiture hearings?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

John P.W. Rosch, a resident of Washington State, is the petitioner in this Court. He was the appellant in the Washington State Court of Appeals.

Whatcom County, Washington is the respondent in this Court and was the respondent before the Washington State Court of Appeals and before the Washington State Supreme Court.

Because petitioner is not a corporation, a corporate disclosure statement is not required under Rule 29.6.

Pursuant to Supreme Court Rule 29 (c), the Court is advised that 28 U.S.C. § 2403 (4)(b) may apply. The State of Washington is a potential party under this section.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John P.W. Rosch respectfully requests that this court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals of the State of Washington entered June 9, 2008.

OPINIONS BELOW

The order of the Washington Supreme Court denying review is reported at 165 Wn.2d 1022, 203 P.2d 379, February 3, 2009.

The opinion of the Washington Court of Appeals is reported at 145 Wash.App.1007, 2008 WL 2332598, June 9, 2008.

A copy of the Court of Appeals opinion and the Washington Supreme Court order denying review are in the Appendix.

JURISDICTION

The Washington Supreme Court denied review of the decision of the Washington Court of Appeals on February 3, 2009. This petition is timely under Rule 13.1. Mr. Rosch invokes the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor shall be deprived of life liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

> States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Court of Appeals decision accurately summarizes the facts. Whatcom County deputy sheriffs seized Petitioner Rosch's truck for forfeiture. Mr. Rosch responded directly to the Sheriff. He requested the hearing provided for by statute and implemented in Whatcom County. This was a trial presided over by Gary James, the Whatcom County Undersheriff. The undersheriff ordered the truck forfeit to the Sheriff's Department.

Mr. Rosch appealed the decision to the Superior Court. Before the Superior Court, the ruling declaring a forfeiture was overturned by stipulation. The parties agreed that the undersheriff erred in declaring a forfeiture based upon the decision of *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993). Because Mr. Rosch had no knowledge of his son's use of the 2001 Chevy truck to facilitate the transfer of drugs and because Mr. Rosch received ownership of the truck on July 6, 2005 and the decree of forfeiture was not entered until September 22, 2005, the transfer of title to him was valid and it defeated the forfeiture order of September 22, 2005. Appendix C, 13-A.

Mr. Rosch asked the superior court to declare the statute unconstitutional and he requested

attorney fees based upon 42 U.S.C. §§ 1983 and 1988. The Superior Court denied the request on the basis that the statute was constitutional. Appendix D, 15-A.

The Court of Appeals concluded petitioner's claim was foreclosed by *In re the Application of Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961). In the opinion of the Court of Appeals, *Borchert* requires a conclusion that by failing to remove the case directly to the Whatcom County District Court, Rosch waived his right to later sue under 42 U.S.C. § 1983 to challenge the constitutionality of the sheriff's court. Appendix B, 2-A.

REASONS FOR GRANTING THE PETITION

The Barons on the Fields of Runnymede in 1215 had the good common sense to retire the sheriff from the role of adjudicator of crimes and forfeitures. They did so in Magna Carta, chapter 24 when they stated, "No sheriff, constable, coroners or others of our bailiffs, shall hold pleas of our Crown." time has come for the same pronouncement to be made ending the reign of the sheriff in Washington as the Forfeiture Czar. *Magna Carta*, The British Library.

Washington's legislature is the only one in the United States which has amended the Uniform Controlled Substances Act to authorize the Chief Law Enforcement Officer to adjudicate forfeitures of personal property including motor vehicles used to transport illegal drugs for sale or delivery. The statute also affords the owner a hearing on the forfeiture if the owner files a claim with the Sheriff. The owner can have the forfeiture heard by a court

of law but only if the owner commences and files a lawsuit to remove the case. If the owner, as here, just files a claim, the forfeiture is heard by the Chief Law Enforcement Officer of the agency which has seized the property, here the Sheriff.

The statute also provides that in the event the personal property is deemed forfeit, the property may be sold. The statute awards 90% of the proceeds realized to the Sheriff.

RCW 69.50.505 violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The statute authorizes the Sheriff or his designee to adjudicate forfeiture hearings and provides, in the event a forfeiture is ordered, that the Sheriff may keep the property or in the event of sale keep 90% of the forfeited proceeds. Appendix E, 18-A.

RCW 69.50.505 also violates due process, the separation of powers doctrine and the Fourth Amendment because it authorizes the Sheriff or his designee to adjudicate forfeiture hearings. A police officer cannot act as a judge in either a criminal or a quasi criminal matter, which a forfeiture is. Appendix E, 18-A.

Washington courts have clearly settled the issues stated above. Washington courts have on numerous occasions upheld the statute. This court should grant certiorari and prohibit the Sheriff from the exercise of any judicial authority.

The issue presented in this case is unique and of great constitutional significance. Can the

legislature create an adjudicatory process headed by the sheriff to determine ownership of personalty allegedly used in the commission of criminal offenses? If so, can the legislature do so in a scheme which rewards the sheriff's department by earmarking to his own department 90% of the value of all items deemed forfeit? This adjudicatory scheme on the top of which sits the sheriff is clearly unconstitutional. Yet it has remained immune from constitutional scrutiny in Washington because of the decision of the Washington Supreme Court in *Borchert*. *Borchert's* holding is incorrect because it permits an unconstitutional adjudicatory process to exist by applying the doctrine of waiver. Due process requires that all adjudicatory procedures erected by the legislature must pass constitutional muster. This principle has been endorsed by the federal courts interpreting the federal constitution. It should also be upheld in a state court in resolving claims under 42 U.S.C. 1983.

SUMMARY OF ARGUMENT

John P.W. Rosch requests that this court grant certiorari and review the Court of Appeals decision. Washington State has a unique forfeiture procedure that violates fundamental due process rights. Washington stands alone as the only state which has enacted within the contours of the Uniform Controlled Substances Act a hearing mechanism where the decision maker on forfeiture is the chief law enforcement officer of the agency that seizes the property for forfeiture and benefits from a decision that deems the property forfeit. It is not a coincidence that the American Law Review annotation on the subject contains only Washington

State Court decisions. "Validity and construction of provisions of Uniform Controlled Substances Act providing for a forfeiture hearing before law enforcement officer", 84 A.L.R4th 627 (1999).

Washington's courts have uniformly and repeatedly rejected constitutional attacks upon the statute since the 1980s. See, e.g., *Smith v. Mount*, 45 Wash. App. 623, 726 P.2d 474, (1986), rev. den., 107 Wash.2d 1016 (1986), 84 A.L.R. 4th 627 (1999); *Lowery v. Nelson*, 43 Wash. App. 747, 719 P.2d 594 (1986), rev. den. 106 Wash.2d 1013 (1986), app. dismd., 479 U.S. 1024, 93 L.Ed.2d 820, 107 S. Ct.864 (1987). All of the opinions upholding the statute against a challenge to the sheriff serving as forfeiture judge have been decisions of the Washington State Court of Appeals, the intermediate appellate court of the state. The Supreme Court of Washington has never accepted a petition for review of any of these decisions.

The Washington forfeiture statute authorizes police to seize and forfeit property such as a motor vehicle which is used to transport drugs for sale or delivery. Here, petitioner's truck was seized by the sheriff's deputies. As the legal and registered owner of the truck, petitioner Rosch received a written notice of the seizure of the truck advising him that the Sheriff had commenced a proceeding to forfeit it. A copy of the entire statute was included with the written notice. Mr. Rosch was thus advised that he must file a claim of ownership with the Sheriff within 45 days of receipt of the written notice to preserve the right to a hearing to contest the forfeiture. The statute explains that the claimant may file a lawsuit according to the rules of civil

procedure to remove the hearing on the forfeiture from the sheriff to a court of law. Appendix E, 18-A.

Petitioner Rosch filed a claim with the sheriff. As a result, he acquired the right to a hearing before the Sheriff or his designee on the matter of whether the truck would be forfeited. The Whatcom County Sheriff has designated his subordinate, Whatcom County Undersheriff Gary James, to preside at these forfeiture hearings. The effect of Mr. Rosch's decision to file the claim with the sheriff instead of removing the forfeiture to a court of law was to waive his right to challenge the constitutionality of the sheriff as forfeiture judge. The Washington Court of Appeals decision in this matter illustrates this reality. The Washington Court of Appeals was bound by prior case law to reject petitioner's constitutional claims. Appendix B, 2-A. And once more, the Washington Supreme Court declined review. Appendix A, 1-A.

Petitioner's first argument is that the economic conflict of interest renders the statute's selection of the sheriff as decision maker untenable under the due process clause of the 5th and 14th amendments.

Petitioner's second argument is that the sheriff is constitutionally barred from presiding as a hearing officer in forfeitures, just as an executive officer such as the Attorney General is barred by the 4th amendment from performing the function of the magistrate to assess probable cause and issue search warrants. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

The Washington Court of Appeals felt bound by the precedent of its previous decisions in *Lowery v. Nelson* and *Smith v. Mount*. The linchpin of these decisions of the Court of Appeals is the doctrine of waiver. Based on the decision of the Washington Supreme Court in *In re Application of Borchert*, 57 Wash.2d 719, 359 P.2d 789 (1961), the Washington Court of Appeals has applied the doctrine of waiver to insulate the statute from constitutional scrutiny. The Court of Appeals likewise held in the present case that because Rosch was offered the option of removal of the forfeiture to a court of competent jurisdiction and did not exercise that option, under settled Washington law he waived his right to challenge the constitutional legitimacy of the sheriff to be a judge in the case.

In this petition for a writ of certiorari, Petitioner Rosch asks the court to overrule or limit *Borchert*. This court should rule that the statute's selection of the Sheriff as adjudicator violates the due process clause of the Fifth and Fourteenth Amendments because of the conflict of interest created by earmarking 90% of the value of items forfeited for the benefit of the Sheriff's Department. This court should also declare that the sheriff, as a member of the executive branch of government, is constitutionally unfit to adjudicate forfeitures.

LEGISLATIVE HISTORY

The legislative history of Washington's forfeiture statute, RCW 69.50.505, shows how it became the only statute in all the fifty states to install an executive branch officer as the decision

maker in a forfeiture proceeding in which that officer has a monetary interest.

In 1970 the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Model Uniform Controlled Substances Act to bring state and federal drug laws into conformity. The Washington State legislature passed the act with minimal revisions in 1971 and enacted RCW 69.50.505. Since 1971, the legislature has made substantial changes to the laws governing forfeiture.

The original 1971 enactment provided no guidelines for notice or a hearing prior to seizure and forfeiture. Appendix I, 25-A. In two cases, the Washington State Supreme Court found that without such provisions the statute violated due process. *Everett v. Slade,* 83 Wash.2d 80, 83, 515 P.2d 1295 (1973); *State v. Matheason,* 84 Wash.2d 130, 524 P.2d 388 (1974). In *Matheason,* the court considered the statute in light of *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). In that case, Puerto Rican authorities seized a yacht without prior notice when they discovered marijuana aboard. The yacht's owner challenged the statute's constitutionality, arguing it violated his due process rights. But the Court upheld the statute, holding that the case presented an extraordinary situation in which postponement of notice and hearing until after seizure did not deny due process. The Court explained that "pre-seizure notice and hearing might frustrate interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction,

destroyed, or concealed, if advance warning of confiscation were given." *Calero-Toledo,* 416 U.S. at 679. The Washington State Supreme Court distinguished *Calero-Toledo* because the challenged Puerto Rican statute in *Calero-Toledo* still provided for notice and a hearing prior to the ship's forfeiture. RCW 69.50.505 did not provide for notice or a hearing at all.

In 1977 the Washington legislature amended portions of RCW 69.50.505 in response to *Everett v. Slade* and *State v. Matheason.* The 1977 statute provided for notice of forfeiture within 15 days of seizure. It also added the provision at issue in this case: that sheriffs or their designees would preside over contested forfeiture hearings. Appendix H, 24-A. This provision made RCW 69.50.505 conspicuously different from the Puerto Rican statute upheld in *Calero-Toledo.* The variation did not go unnoticed at the time. A 1977 Senate Judiciary Committee staff memo noted the possibility of a due process problem:

> there may be due process problems with having the forfeiture hearing held before the chief law enforcement officer of the seizing agency. The Puerto Rico forfeiture statute before the U.S. Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.,* Supra, provided for a court hearing on the forfeiture at the request of the claimant.

Appendix K, 29-A.

The legislative history does not explain why the Washington legislature elected to give sheriffs this judicial power. Petitioner can find no other instance in any other state of a forfeiture statute providing the sheriff with similar adjudicatory responsibilities. The original 1970 Model Act does not give this power to sheriffs, nor do the amended Acts promulgated by the NCCUSL in 1990 and 1994.

In 1981 the Washington Legislature once again encountered RCW 69.50.505 when it created an independent office of administrative law judges. Before 1981, state law allowed agencies to employ hearing officers to conduct contested case hearings in accordance with the Administrative Procedure Act. Under the new law, effective July 1, 1982, all hearing officers would be moved to a central Administrative Law Judge (ALJ) office which administers agency hearings statewide. See RCW 34.12.

The 1981 bill that created the central office for state administrative law judges also amended RCW 69.50.505 by stripping the sheriff's power to designate the presiding officer at a forfeiture hearing. The hearing was now to be conducted before the "chief law enforcement officer of the seizing agency or an administrative law judge." Appendix G, 23-A. But before the 1981 bill could take effect, the legislature once again modified the law, exempting local law enforcement from any possibility of using administrative law judges to hear forfeiture cases. The legislative record suggests that the rationale was that since local drug control agencies were responsible for seizure, they should also oversee the subsequent forfeitures as well. At a

hearing before the State Senate Judiciary Committee in February 1982, where proposed amendments were being considered, a committee staff member explained:

> the third amendment deletes the local law enforcement agencies from the requirement of using the Administrative Law Judge when enforcing the Uniform Controlled Substance Act. The major reason for this amendment is that this is a local issue, a local agency; the Administrative Law Judge was set up to handle state agencies, and so that for that reason the police departments and the Administrative Law Judge are in agreement that they probably should not be included within the purview of this statute.

Appendix J, 27-A.

Since 1982, RCW 69.50.505 has not been materially altered with regard to the laws controlling forfeiture proceedings.

As the legislative history shows, ever since 1977 and continuing at present, Washington's statute has the unique feature of the sheriff serving both as the chief law enforcement officer of the seizing agency and as the judicial officer who determines whether the seized items are forfeit.

ENGLISH COMMON LAW

The English Common Law long ago determined that it is improper for a sheriff to have a role as a judicial officer. The strength of England's monarchy was unique in medieval Europe. Its comparable stability provided the foundation for the central judiciary which developed over the centuries following the Conquest. As the judiciary grew, the sheriff's power was gradually curtailed. He changed from a powerful independent local figure into an agent of the Crown. When in 1215 the sheriff was proscribed in the Great Charter from "holding pleas of our Crown," his office had already been radically limited.

The height of the sheriff's judicial power came in the century following the Conquest when he presided over the County Court. The first considerable changes to the office occurred under King Henry I, who created a central court, his *Curia Regis,* and reserved the right to call up pleas from local courts. King Henry created the office of the professional justice and sent his justices on circuit to hear local pleas in the County Court. This reform diminished the sheriff by placing him in a subordinate position to the King's own representatives and *Curia.* As well, in 1108 he forbid the sheriff from summoning special sessions of the County Court at will, "a provision from which has been drawn the inference that the latter had made the local courts instruments of fiscal oppression." Morris, William Alfred: "The Medieval English Sheriff to 1300", at 89, Manchester: University Press, 1927. See also Stubbs, William: "The Constitutional History of England in its Origin and

Development, Volume I, (sixth edition)" at 429, Oxford: Clarendon Press, 1903; Stubbs, William: "Select Charters and Other Illustrations of English Constitutional History (second edition)," at 103-4, Oxford: Clarendon Press, 1874.

King Henry also created the Exchequer to limit the corruption involved in the collection of taxes and to compel the sheriff to account for his general income as well as income he collected resulting from the King's pleas of interest heard locally.

From this point onward it is evident that the King considered forfeiture to be one of these special pleas of interest, separate from the common pleas over which the sheriff still retained some jurisdiction.

> When a tenant-in-chief of the king guilty of felony was according to feudal law sentenced to forfeiture, the sheriff took over the revenues from his lands and turned them in at the exchequer. The proceeds of the sale of his moveables also fell to the crown.

Morris, *Medieval English Sheriff* at 131.

But by the end of Henry's reign the sheriff could no longer act as a local judge without a separate appointment from the King. His judicial independence had been irreparably assailed.

King Henry II took the throne in 1154 following nineteen years of civil war. During that

time, local sheriffs had restored some of their former power. Some sheriffs ruled over multiple shrievalties, while others garnered Crown appointments to preside as a King's justice in their own county.

Henry II restored the system of *Curia Regis* his grandfather had instituted, and appointed his own royal justices to preside at the County Courts. As well, he memorably opened his own courts to all freemen:

> It was no longer to be an extraordinary tribunal, a court for great men, for great causes, for matters that concerned the king; it was to become an ordinary tribunal for the whole realm.

Pollock, Frederick, and Maitland, Frederic William: "The History of English Law Before the Time of Edward I, Volume I (second edition)," at 153, Cambridge: University Press, 1898.

With his Assizes of Clarendon (1166) and Northampton (1176) Henry ended the practice of hereditary shrievalties and diverted cases in baronial courts of private jurisdiction to his *Curia*. He reserved judgment of Crown pleas to the King's Court's exclusive consideration and succeeded in "establishing the somewhat astounding rule that no plea concerning land could be commenced in any court without the authority of a royal writ." McKechnie, William Sharp, "Magna Carta: a Commentary on the Great Charter of King John (second edition)," at 89, New York: Burt Franklin, 1958.

Henry II increased his judicial staff and organized the judiciary into two main courts, one to deal with common pleas (the Bench) and one which would handle Crown pleas and only be heard in the King's presence (the King's Bench). All this was done at expense to the sheriff's independence, and to the benefit of the central King's court:

> It was destined to increase, while all the other courts were destined to decrease; but we must not yet think of it as a court of first instance for all litigants; rather it, like every other court, had its limited sphere of jurisdiction. Happily the bounds of that sphere were never very precisely formulated; it could grow and it grew. ...In the first place there were the pleas of the crown (*placita coronae*), matters which one way or another especially affected the king, his crown and dignity. All infringements of the king's own proprietary rights fell under this head, and the king was a great proprietor. But in addition to this almost all criminal justice was gradually being claimed for the king; such justice was a profitable source of revenue, of forfeitures, fines and amercements.

Maitland, Frederic William: "The forms of action at common law: two courses of lectures (second edition)," at 10, Edited by A. H. Chaytor and W. J. Whittaker, Cambridge: Cambridge University Press,

1936.

The effect of the reign of Henry II in circumscribing the role of the sheriff is well documented by historians. He began an investigation of provincial justice in 1170 and found that some sheriffs were using their confiscatory powers in a self-serving manner:

> He seems to have taken advantage of the opportunity afforded by the complaints of the people to enter upon a general investigation of the provincial administration of justice, not merely in the county and hundred courts and royal demesne, but in the franchises of the barons, lay and ecclesiastical: and further to have inquired narrowly into the confiscations of goods of the persons who had fled from justice under the Assize of Clarendon, showing some suspicion as to the honesty of the sheriffs both in the examination of charges and in the disposition of the forfeitures.

Stubbs, *Select Charters* at 147; See also Pollock & Maitland, *History of English Law* at 137-38 for additional discussion of the Inquest of Sheriffs.

King Richard continued to limit the sheriff's power. In 1194 he forbade the sheriff to act as justice of his own county:

> This seems to show dissatisfaction with the conduct of sheriffs since the

> beginning of the reign, especially the powerful group lately in office, and indicates a determination to make every sheriff subject to a higher judicial authority which may investigate his acts.

Morris, *Medieval English Sheriff* at 138-39.

As well, King Richard laid out the process of selecting the grand jury out of the hundred at County Court, "likewise a check on the power of the sheriff, to whom the nomination seems to have before belonged." Stubbs, *Select Charters* at 27-28.

The next major development was the Magna Carta. Chapter 24 of Magna Carta reads, "No sheriff, constable, coroners or others of our bailiffs, shall hold pleas of our Crown." Writes W.S. McKechnie: "the main object of this provision is not open to doubt: men accused of crimes must be tried before the King's judges and not by local magistrates of whatsoever kind." McKechnie, *Magna Carta* at 305.

But the Great Charter was not a new proscription of the sheriff's powers. Rather, as Pollock and Maitland write, "On the whole, the charter contains little that is absolutely new. It is restorative. John in these last years has been breaking the law; therefore the law must be defined and set into writing." Pollock & Maitland, *History of English Law* at 172.

ANALYSIS OF THE COURT OF APPEALS DECISION

The Washington Court of Appeals decision in petitioner's case did not consider the constitutional arguments raised in this petition because Washington courts had previously ruled both that the statute was constitutional and that petitioner had waived his right to challenge the constitutionality of the statute by not filing a lawsuit to remove the forfeiture to a court of law.

Washington courts have never addressed the merits of the petitioner's constitutional objections. No Washington court has ever explained why the earmarking of 90% of the value of forfeited items to the sheriff's department does not violate the Fifth Amendment and the decision of *Ward v. Monroeville,* 409 U.S. 57, 93 S.Ct.80, 34 L.Ed2d 267 (1972). No Washington court has explained why *Coolidge* does not require a declaration of the unsuitability of the sheriff to adjudicate. The Washington Court of Appeals in *Smith v. Mount* avoided this argument because the property forfeited in that case – a pole building – was destroyed and also by resort to the waiver doctrine of *Borchert.* The financial conflict of interest issue was not considered in *Lowery v. Nelson.*

As the Court of Appeals noted in the present case, *Borchert* upheld as valid a court system whereby unsalaried justices of the peace were paid by fees. "The Supreme Court held that because Borchert was offered, but refused change of venue to a salaried judge, Borchert waived his right to be tried before a tribunal that would have afforded due

process, even if the particular judge who decided the case was influenced by the compensation she would receive." The Court of Appeals erroneously applied *Borchert* to find that Rosch waived his right to challenge the constitutionality of the sheriff's court when he requested a hearing in the sheriff's court and did not immediately file a lawsuit to remove the case to a court.

Rosch cited *Gete v. I.N.S.*, 121 F.3d 1285, 1293-94 (9th Cir. 1997), to support his position that when a litigant finds himself before an adjudicatory system that is constitutionally defective, he cannot be barred from challenging its constitutional legitimacy. *Gete* held that the government cannot justify unconstitutional administrative forfeiture procedures merely by pointing to the fact that it provides a lawful judicial forfeiture option. The Court of Appeals attempted to distinguish *Gete* by pointing out that Borchert had a de novo trial available after a loss in the fee paid justice of the peace court. And in its closing comments, the Washington Court of Appeals reasoned that *Gete* was different because the administrative decision-making process there was grossly inferior to the justice provided by the unsalaried justice of the peace.

The Court of Appeals attempt to distinguish *Gete* is unconvincing. First, the safeguard of a de novo trial was not available to Rosch. If the claimant participates in a hearing with the sheriff and loses, he can only appeal the decision of the sheriff to the Superior Court through the Administrative Procedure Act, RCW 34.04. He is not provided with a trial de novo as Borchert was. It is an appeal where

findings of fact will be affirmed so long as they are supported by substantial evidence. The Sheriff's court is worse than the system in *Borchert* for the additional reason that Borchert was offered a change of venue to a salaried justice of the peace at the very outset for no cost or effort on his part. Removal under RCW 69.50.505, on the other hand, requires the litigant to draft, file and serve a summons and complaint and to pay the fees and costs related thereto.

Second, and even more importantly, Rosch argued that if the underlying adjudicatory system under attack is found to be unconstitutional, the system cannot avoid scrutiny by the doctrine of waiver. *Gete* supports this argument and is in direct conflict with *Borchert*.

Gete rejects any waiver argument if the effect is to insulate *any* unconstitutional adjudicatory system from scrutiny – not just very bad unconstitutional ones. Even *Borchert*, with its de novo trial safeguard, is wrong under *Gete* because it contemplates and condones a substandard and inherently biased court for the first trial so long as a decent court is available for a second round.

The litigant before the Sheriff's court is subjected to an inherently biased fact finding by an officer who is himself engaged in the competitive enterprise of ferreting out crime. No matter how biased the fact finding, under *Borchert* the Sheriff's court is determined to be impartial simply because a judicial alternative was offered. Under *Gete* this is wrong.

Now years after the Washington unsalaried justices of the peace courts analyzed in *Borchert* have become extinct, Washington's unique police operated forfeiture court flourishes and prospers. The litigant before the Sheriff is stuck with his record and only an appeal on the record, not trial de novo, is available. Because RCW 69.50.505 does not allow de novo review, scrutiny of the sheriff's court should at least be more rigorous than in *Borchert*. But even *Borchert* is wrong in its holding that waiver can insulate an adjudicatory process from having its fundamental fairness questioned.

Petitioner asks this court to analyze and ascertain the constitutional legitimacy of the Sheriff's forfeiture court. Washington courts have refused to undertake this constitutional scrutiny.

ARGUMENT: DUE PROCESS

I. RCW 69.50.505 violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The statute authorizes the Sheriff or his designee to adjudicate forfeiture hearings and provides, in the event forfeiture is ordered, that the Sheriff may keep the property or in the event of sale keep 90% of the forfeited proceeds.

The property initially forfeited here was a truck worth approximately $15,000.00. Because the statute allows an economic benefit to inure to the Sheriff's Department in the event of a decree of forfeiture, the statute is defective under the Due Process Clause of the United States Constitution.

A brief review of the leading cases is in order. The first is *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), a case cited in *Borchert. Tumey* reversed convictions for violations of a prohibition era law rendered by the Court of the Mayor of North College Hill, Ohio. The Ohio statutory scheme in *Tumey* was similar to RCW 69.50.505 in that it split the proceeds of fines from liquor law violations between the state treasurer and the mayor's locality and permitted the locality to earmark the funds to be used for the purpose of securing the enforcement of any prohibition law. *Tumey,* 273 U.S. at 518. Under an ordinance adopted pursuant to this scheme, the mayor, an executive officer under Ohio law, received a payment of his costs incurred in the event of his conviction of a defendant for violation of the liquor laws. The Supreme Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey,* 273 U.S. at 523. Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," *Tumey,* 273 U.S. at 534, the test for due process is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey,* 273 U.S. at 532. Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain

the high level of contribution from the mayor's court. Washington's statute creates a situation analogous to *Tumey* "in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey*, 273 U.S. at 534.

The next Supreme Court case involving a due process attack on an adjudication process was *Dugan v. Ohio*, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928), also cited in *Borchert*. There the Supreme Court found the circumstances different from those in *Tumey* and upheld the adjudication process under scrutiny. In that case a mayor had the power to convict and fine for possession of intoxicating liquor, and also had a right to vote on the appropriation and spending of city funds to which the fines he imposed were a contribution. The court found that the system gave the mayor only a remote relation to and dependence upon the city funds. By contrast, in *Tumey*, direct dependence of the mayor upon convictions for compensation for his services as a judge was found to be inconsistent with due process of law. Due process was violated in *Tumey* for the further reason, not present in *Dugan*, that,

> a defendant brought into court might with reason complain that he was not likely to get a fair trail or a fair sentence from a judge who as chief executive was responsible for the financial condition of the village, who could and did largely control the policy

> of setting up a liquor court in the village with attorneys, marshals, and detectives under his supervision, and who by his interest as mayor might be tempted to accumulate from heavy fines a large fund by which the running expenses of a small village could be paid, improvements might be made, and taxes reduced.

Dugan, 277 U.S. at 65.

The next case was *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). The Mayor of the town also was a magistrate in traffic court. The municipality derived a large portion of its revenue from the adjudication of speeding tickets. Even though there was no personal gain to the adjudicator, the court held that the mayor's rule as judge violated the due process principle that the adjudicator should have absolutely no financial interest in the outcome of the adjudication.

In Whatcom County, as in Monroeville, the Sheriff and his deputies get paid their salary no matter what they decide. Nevertheless, as in Monroeville, there is a substantial financial incentive for them to declare forfeiture. This incentive is embedded in the distribution formula established in RCW 69.50.505. Even when the items forfeited are large sums of currency and expensive items of personalty such as cars, boats and aircraft, the Sheriff's Department may keep the item or else sell it and retain 90% of the proceeds. This is inconsistent with *Ward v. Monroeville*

The most recent consideration by the United States Supreme Court of a due process challenge to an adjudication process based upon an economic benefit resulting from an adjudication was *Connally v. Georgia,* 429 U.S. 245, 97 S. Ct. 546, 50 L. Ed2d 444 (1977). It seems likely that the absence of more recent cases in this vein is that this Court's precedents have caused other similarly conflicted adjudicatory processes to finally become extinct—except for the Sheriff's forfeiture court in the State of Washington. In *Connally,* the Georgia Justice of Peace system was held to violate due process because a Justice of the Peace who granted an application to issue a search warrant was paid $5.00 but was paid nothing if he denied the application. The Court summarized *Tumey* and *Ward v. Monroeville* and found them applicable:

> The present case, of course, is not precisely the same as *Tumey* or as *Ward,* but the principle of those cases, we conclude, is applicable to the Georgia system for the issuance of search warrants by justices of the peace. The justice is not salaried. He is paid, so far as search warrants are concerned, by receipt of the fee prescribed by statute for his issuance of the warrant, and he receives nothing for his denial of the warrant. His financial welfare, therefore, is enhanced by positive action and is not enhanced by negative action. The situation, again, is one which offers 'a possible temptation to the average man as a judge . . . or which might lead him

> not to hold the balance nice, clear and true between the State and the accused.' It is, in other words, another situation where the defendant is subjected to what surely is judicial action by an officer of a court who has 'a direct, personal, substantial, pecuniary interest' in his conclusion to issue or to deny the warrant.

Connally, 429 U.S. at 250.

The situation in Whatcom County is analogous. Law enforcement is chronically starved for funding and concerned about workload. The pressure is great upon the Sheriff to be biased in favor of entering an order of forfeiture. The temptation presented by the opportunity to supplement the Sheriff's assets and funds by declaring forfeit a valuable vehicle or boat or a sack of cash is too great to expect that the Sheriff will hold the balance nice, clear and true between the state and the property owner. Because due process prohibits the existence of an adjudicatory system in which there is such a substantial economic interest influence upon the decision maker, RCW 69.50.505(5) is unconstitutional and its enforcement should be enjoined.

ARGUMENT: FOURTH AND FIFTH AMENDMENTS

II. The designation of the Sheriff as adjudicator in RCW 69.50.505 violates due process, the separation of powers doctrine, and the Fourth Amendment because police officers are per se barred

from being adjudicators.

The designation of the sheriff as an adjudicator in a quasi-criminal forfeiture is antithetical to the decision of the United States Supreme Court in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed2d 564 (1971). There the United States Supreme Court reemphasized the constitutional necessity that magistrates of all kinds be "neutral and detached:"

> The classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436:
>
> > 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested

> determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.' [Citations omitted]

In this case, the determination of probable cause was made by the chief 'government enforcement agent' of the State—the Attorney General—who was actively in charge of the investigation and later was to be chief prosecutor at the trial. To be sure, the determination was formalized here by a writing bearing the title 'Search Warrant,' whereas in *Johnson* there was no piece of paper involved, but the State has not attempted to uphold the warrant on any such artificial basis. Rather, the State argues that the Attorney General, who was unquestionably authorized as a justice of the peace to issue warrants under then existing state law, did in fact act as a 'neutral and detached magistrate.' Further, the State claims that any magistrate, confronted with the showing of

> probable cause made by the Manchester chief of police, would have issued the warrant in question. **To the first proposition it is enough to answer that there could hardly be a more appropriate setting than this for a per se rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations-the 'competitive enterprise' that must rightly engage their single-minded attention.** Cf. *Mancusi v. DeForte*, 392 U.S. 364, 371, 88 S.Ct. 2120, 2125, 20 L.Ed.2d 1154.

Coolidge, 403 U.S. at 449-50 (emphasis added). The Court concluded:

> We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all. If the seizure and

> search are to be justified, they must, therefore, be justified on some other theory.

Coolidge, 403 U.S. at 453.

Coolidge applies forcefully here. If a prosecutor cannot be authorized to issue search warrants, sheriffs may not be authorized to preside at forfeiture hearings—most definitely not where the Sheriff gets 90% of the value of the item forfeited in the event the Sheriff rules in favor of the forfeiture.

The Court of Appeals did not address Rosch's argument based upon *Coolidge.* And it was not addressed by the Court of Appeals in the preceding cases either. This Court should take review in order to decide whether Washington's courts have erred in failing to take cognizance of *Coolidge* as a controlling precedent.

CONCLUSION

The issue presented in this case is unique and of great constitutional significance. The State of Washington continues to authorize and sanction the use of an unconstitutional adjudicatory process headed by the sheriff to determine ownership of personalty allegedly used in the commission of criminal offenses. The scheme rewards the sheriff by earmarking 90% of the value of all items deemed forfeit for the benefit and use of his department. Due process requires that all adjudicatory procedures erected by the legislature pass constitutional muster. The cases from Washington's Court of Appeals have perpetuated the existence of an unconstitutional

court by incorrectly relying on the doctrine of waiver. This Court should repair to its own principles which had their origin so long ago in the reforms of Henry II and upon the Fields of Runnymede, and declare RCW 69.50.505 (5) unconstitutional and enjoin its enforcement.

Petitioner is also entitled to an award of reasonable attorney fees and costs. This court is requested to award Rosch reasonable fees and costs as prevailing party under 42 U.S.C §§ 1983 and 1988.

Respectfully submitted.

WILLIAM JOHNSTON
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Bellingham, WA 98225
(360) 676-1931

APPENDIX A

The Supreme Court of Washington

In the Matter of:
The Seizure and Forfeiture of Property pursuant to RCW 69.50

THE COUNTY OF WHATCOM,
Respondent,

v.

Tan 2001 Chevrolet K1PU, WA/A30976L VIN 2GCEK19T311289710 and JOHN P.W. ROSCH,
Petitioner.

N0. 81928-9
ORDER
C/A NO. 61259-0-I

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Owens and J. Johnson, at its February 3, 2009, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED.
That the Petition for Review is denied.

Dated at Olympia, Washington this 3rd day of February, 2009.

For the Court

(Signed)
Gerry L. Alexander
Chief Justice

APPENDIX B

Court of Appeals of Washington,
Division 1.

WHATCOM COUNTY,

Respondent,

v.

John P. ROSCH,

Appellant.

No. 61259-0-I.
June 9, 2008.

Appeal from Whatcom County Superior Court; Honorable Ira J. Uhrig, J.

Craig D. Chambers, Hilary A. Thomas, Attorney at Law, Whatcom County Prosecutors Office, Bellingham, WA, for Respondent.

William Joseph Johnston, William George Knudsen, Attorney at Law, Bellingham, WA, for Appellant.

DWYER, A.C.J., LEACH and APPELWICK, JJ.

UNPUBLISHED
PER CURIAM.

John P.W. Rosch successfully challenged a decision by a Whatcom County Sheriff's designate, who concluded that a truck Rosch owned was forfeited as a result of his son using it to deal drugs. The superior court ordered the truck be returned to Rosch and awarded him some of his attorney fees.

The court, however, denied Rosch's request for declaratory and injunctive relief and attorney fees

under 42 U.S.C.A. § 1983. On appeal, Rosch argues that the forfeiture statute is unconstitutional because it allows the sheriff or sheriff's designate to adjudicate forfeiture proceedings and, therefore, the superior court erred when it did not award him attorney fees under the federal statutes. Rosch, however, elected to proceed before the sheriff's designate, rather than challenging the forfeiture in court. He, therefore, waived his right to challenge the constitutionality of the less formal proceeding. We affirm.

FACTS

John Patrick Rosch owned a tan Chevrolet pickup truck. On June 23, 2005, he allowed another person to use the truck to deliver illegal drugs. A week later, John himself used the truck to deliver drugs. On July 6, 2006, John transferred title to the truck to his father, but the next day, he once again used the truck to deliver drugs.

On July 13, 2005, the Whatcom County Sheriff's Department seized the truck and notified John's father, John P.W. Rosch, of its intention to forfeit the truck pursuant to RCW 69.50.505. The notice advised Rosch that if he claimed ownership, he was entitled to a hearing before the sheriff or his designate, or a hearing in a court of competent jurisdiction.

Rosch challenged the forfeiture, but did not exercise his right to remove the matter to a court. Whatcom County Undersheriff Carey James presided at an administrative hearing. Three members of the Northwest Regional Drug Task Force testified in favor of forfeiture and established that the truck was used to deliver drugs two times before John transferred the title to Rosch. Rosch

testified that he was aware that his son used drugs, but he did not know his son was using the truck to deal drugs.

The undersheriff ordered forfeiture. Rosch petitioned for judicial review in the superior court. Rosch asked the court to declare RCW 69.50.505 unconstitutional, prohibit enforcement of the statute in the future, and award damages and attorney fees under RCW 69.50.505 and 42 U.S.C. § 1983 and § 1988. He moved for summary judgment. Whatcom County conceded that the forfeiture order should be overturned, but argued that Rosch should not be awarded all the attorney fees he requested. The court ordered the sheriff to return the truck to Rosch and granted him $2,500 in attorney fees and costs, but denied his request for declaratory and injunctive relief and attorney fees under 42 U.S.C.1983 and 1988.

Rosch sought direct review of the summary judgment order in the Supreme Court. The Supreme Court denied direct review and transferred the case to this court.

ANALYSIS

Rosch contends that RCW 69.50.505 is unconstitutional. Whatcom County first argues that this court should dismiss Rosch's appeal because it is moot. We disagree.

In general, the jurisdiction of a court may not be invoked unless there is a justiciable controversy. A justiciable controversy exists if there is
'(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests

that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.' *To- Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), quoting Diversified *Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

Whatcom County argues that Rosch's appeal does not present "an actual, present and existing dispute" because his truck was returned and he was awarded attorney fees and, therefore, his appeal is moot. But Rosch's constitutional claims under 42 U.S.C.A. § 1983 are separate from his demand for the truck's return and attorney fees under the state statute. The federal statute provides remedies not otherwise available. See *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 10, 829 P.2d 765 (1992). If Rosch can establish a constitutional violation, he may have a legitimate claim under § 1983. The cases cited by the County do not hold to the contrary. See *Wash. Educ. Ass'n v. Pub. Disclosure Comm'n,* 150 Wn.2d 612, 80 P.3d 608 (2003); *Superior Asphalt and Concrete Co. v. Dep't of Labor and Indus.*, 121 Wn.App. 601, 89 P.3d 316 (2004), review denied, 153 Wn.2d 1005, 103 P.3d 1248 (2005). We, therefore, consider Rosch's appeal further.

Constitutional challenges to statutes are questions of law and are reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Rosch argues that RCW 69.50.505 is unconstitutional because it allows the sheriff or sheriff's designate to adjudicate forfeiture proceedings and allows the sheriff's department to retain the forfeited property or its proceeds for its own use. Rosch contends that the statute violates his due process right to an impartial decisionmaker. The

parties agree that *In re the Application of Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961), controls. Rosch argues that Borchert should be overruled. His argument is not persuasive. It depends upon the 9th Circuit's decision in *Gete v. I.N.S.*, 121 F.3d 1285 (9th Cir.1997), which is distinguishable from *Borchert*.

Borchert involved an adjudication by an unsalaried justice of the peace. Richard Borchert was arrested for driving while under the influence of alcohol (DUI), reckless driving, and operating a motor vehicle without a valid license. When he was arraigned before an unsalaried justice of the peace, he challenged the court's jurisdiction, contending that the statute that fixed the compensation of justices of the peace on a fee basis was unconstitutional. Before the justice of the peace ruled on Borchert's motion, she offered to grant him a change of venue to a salaried judge. Borchert refused the offer, and the justice of the peace denied his motion to dismiss. He was found guilty of DUI and operating a motor vehicle without a valid license.

Borchert sought a writ of habeas corpus in superior court. He argued that the justice was prejudiced against him because she was paid on a fee basis rather than a fixed salary and, therefore, the fee justice lacked jurisdiction to try his case. The superior court granted the writ. The Supreme Court reversed.

The Supreme Court explained that a judge is biased or prejudiced if he or she has a preconceived adverse opinion against a person's cause without just grounds, or before sufficient knowledge. *Borchert*, 57 Wn.2d at 722. Borchert contended that prejudice was inherent in the system that provided

for unsalaried justices of the peace. But the system provided for both salaried and unsalaried justices of the peace and, if Borchert believed that the fee justice was prejudiced against him, he had an absolute right to a change of venue to a salaried judge, with no cost to him. Furthermore, although bias or prejudice of a judicial officer may affect or disqualify a particular forum or venue, it does not affect jurisdiction. *Borchert*, 57 Wn.2d at 722-23. Courts presided over by unsalaried justices of the peace were authorized by, and in conformity with, the state constitution. Therefore, the fee justice court had jurisdiction over the offense. *Borchert*, 57 Wn.2d at 723.

The Borchert court distinguished the federal Supreme Court case upon which the superior court had relied in finding that the fee justice compensation statute was unconstitutional, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). The accused in *Tumey* was charged in the "liquor court" of North College Hill, Ohio, with illegal possession of liquor. The "liquor court" was established by a village ordinance and was presided over by the village mayor. The mayor was not compensated for performing his judicial duties unless he found the accused guilty. Because the ordinance did not provide for a trial by jury, there could be no change of venue. The right of appeal was limited to questions of law. Under those circumstances, the judicial system created by the village ordinance denied the accused procedural due process. *Borchert*, 57 Wn.2d at 723.

After the *Borchert* court distinguished *Tumey* and concluded that the statute did not inherently deny the accused due process, it considered whether Borchert actually received due process. The Supreme

Court held that, because Borchert was offered, but refused, a change of venue to a salaried judge, Borchert waived his right to be tried before a tribunal that would have afforded him due process, even if the particular justice who decided his case was influenced by the compensation she would receive. *Borchert*, 57 Wn.2d at 725-26.

Rosch contends that *Borchert* is no longer viable after the 9th Circuit's decision in *Gete*, which involved the seizure and administrative forfeiture of property by the Immigration and Naturalization Service (INS). *Gete*, however, is distinguishable from *Borchert*.

Gete involved ten named plaintiffs whose vehicles were seized by the INS for allegedly transporting illegal aliens into the United States. The opinion does not set forth the facts relating to all ten plaintiffs, but apparently none of them was guilty of anything more than an honest mistake.

The vehicles owners' could contest the forfeitures in court or in an administrative "personal interview." To challenge the forfeitures in court, the owners needed to post a bond, and the government would retain both the bond and the car throughout the litigation process. No bond was required for the administrative process, although the INS would still hold the car pending the outcome of the proceeding. The plaintiffs chose the quicker, less costly administrative proceeding. Some of the owners apparently recovered their vehicles after paying a fine and fees. Others lost their vehicles permanently. Later, the plaintiffs sued the INS, alleging that its procedures violated their constitutional rights.

The district court dismissed most of the plaintiffs' claims based upon lack of jurisdiction. Alternatively, the district court held, and the INS

argued on appeal, that by opting for the administrative procedure, rather than the judicial process, the plaintiffs waived their right to judicial review of the agency's procedures and their right to bring constitutional challenges. The 9th Circuit Court of Appeals reversed, stating that the district court's and government's position "simply cannot be correct. If it were, it would insulate the INS' policies and procedures from review even if, for example, the agency followed a policy of issuing favorable administrative forfeiture rulings to all relatives of INS officials and unfavorable rulings to all minorities." *Gete*, 121 F.3d at 1293.

The appellate court explained the vehicle owners' options under the federal statutes. After a vehicle was seized, a form letter informed the owners that they could invoke the judicial process by commencing an action in federal court or proceed administratively by attending a personal interview with an immigration officer.[1] Under the administrative procedure, an immigration officer had to return the vehicle to the owner if the officer decided that the government lacked probable cause to seize it or that no violation occurred. If the officer decided that a violation occurred, but the owner established he was not privy, or give consent, to the illegal use of his vehicle, the INS Regional Commissioner had the discretion either to forfeit the vehicle or declare that pursuing forfeiture was not in the best interest of justice and return the vehicle to the owner. Otherwise, the vehicle was automatically

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[1] The court noted that the letter was inaccurate and illogical because the vehicle owner does not "commence" judicial forfeiture; the owner has the option to "obtain" judicial forfeiture. *Gete*, 121 F.3d at 1290 n. 8.

deemed forfeited.

If the INS determined that a vehicle was forfeited, it issued a declaration to that effect without any statement of the reasons. The former owner could then ask either that the forfeiture be remitted and the vehicle returned without penalty, or that the penalty be mitigated, allowing the vehicle to be returned upon the payment of a fine and fees. When the Regional Commissioner denied a request for remission or mitigation, he was to issue a written determination setting forth the reasons for the denial, but in practice, the INS provided only a form letter with check marks next to the standard reasons for rejection that the Commissioner considered applicable. After that, the petitioner could request reconsideration, but such requests had to be based upon evidence not previously considered. If the request for reconsideration was denied, no further review was available in any forum.

The 9th Circuit Court rejected the government's contention that the vehicle owners waived their right to judicial review of the agency's procedures and their right to bring constitutional challenges by choosing the administrative option:

> Under the INS' approach, as long as a lawful judicial procedure was provided as an option, an agency would be free to adopt and apply any administrative procedures it wished, no matter how flagrantly unconstitutional. Such a theory of unfettered, unlawful, and unreviewable agency discretion clearly conflicts with the relevant case law and the Administrative Procedures Act, not to mention the Constitution. In order to

> accept it, we would be required not only to repudiate the settled law concerning waivers of constitutional rights, but also to give government officials free rein to do whatever they chose, no matter how arbitrary, capricious, or clearly unconstitutional, as long as they acted in the context of administrative hearings for which a judicial alternative was offered.

Gete, 121 F.3d at 1293.

Gete is distinguishable from Borchert because the fee justice system in Borchert gave the accused person a right to a trial de novo in superior court if he was not satisfied with the outcome by the unsalaried justice of the peace. The fee justice system provided safeguards against bias or prejudice of a justice of the peace. In contrast, the administrative process at issue in *Gete* provided no such safeguards against arbitrary or clearly unconstitutional actions. *Gete* does not provide a basis for overturning *Borchert*.[2] When Rosch elected to allow the sheriff's designate to decide the forfeiture, he waived his right to challenge the constitutionality of the statute and argue that he was denied due process.

ATTORNEY FEES

Rosch asks this court to award him his

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[2] Of course, this court may not overturn a Supreme Court decision. As discussed above, Rosch petitioned for direct review in the Supreme Court, and the parties' briefs are the same as those filed in that court.

attorney fees on appeal. Because he is not the prevailing party, his request for an award of fees on appeal is denied.

CONCLUSION

Rosch waived his right to challenge the constitutionality of a sheriff or sheriff's designate deciding forfeiture when he opted to challenge the forfeiture before the sheriff's designate, rather than a judge. Therefore, the superior court did not err when it declined to award Rosch attorney fees and costs under 42 U.S.C.A. § 1983. The lower court's decision is affirmed, and Rosch's request for his attorney fees on appeal is denied.

Wash.App. Div. 1,2008.
Whatcom County v. Rosch
Not Reported in P.3d, 145 Wash.App. 1007, 2008 WL 2332598 (Wash.App. Div. 1)

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

THE COUNTY OF WHATCOM,
Plaintiff.

vs.

TAN 2001 CHEVROLET PICKUP,
VIN #2GCEK19T311289710
AND
JOHN P.W. ROSCH,
DEFENDANTS

JOHN P.W. ROSCH,
PLAINTIFF,

vs.

GARY JAMES, UNDERSHERIFF FOR WHATCOM COUNTY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AND FOR WHATCOM COUNTY, A SUBDIVISION OF THE STATE OF WASHINGTON
Defendants.

No. 05-2-02400-0

ORDER

THIS MATTER having come on regularly for hearing on plaintiff John P.W. Rosch's petition for judicial review and motion for summary judgment, and the plaintiff being represented by WILLIAM JOHNSTON, and the County of Whatcom being represented by his attorney, CRAIG CHAMBERS and the Court having carefully reviewed the pleadings and heard argument of counsel, NOW THEREFORE it is hereby:

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Sheriff is direction to return the Tan 2001 Chevrolet to the plaintiff John P.W. Rosch.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the plaintiff's motion for costs and attorney fees is granted as to the legal work and costs related to the return of the vehicle. The court awards judgment in favor of William Johnston in the sum of Twenty Five Hundred dollars as reasonable attorney fees and costs.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the plaintiff's motion for summary judgment seeking a declaration as to the constitutional invalidity of RCW 69.50.505 and an injunction against its enforcement and costs and attorneys fees pursuant to 42 U.S.C. 1983 and 1988 is denied.

DATED this 4th day of AUGUST, 2006

(Signed)
Judge

(Signed)
William Johnston, WSBA#6113
Attorney for Plaintiff, JOHN P.W. ROSCH

(Signed)
CRAIG D. CHAMBERS, WSBA #11771

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WHATCOM

In the Matter of:
The Seizure and Forefeiture (sic)
of Property Pursuant to RCW 69.50

The County of Whatcom

Plaintiff,

vs

Tan 2001 Chevrolet K1PUWA/A30976L
VIN 2GCEK19T311289710
and
John P.W. Rosch,

Defendant,

No. 05-2-02400-0
Supreme Court No.
79142-2

VERBATIM REPORT OF PROCEEDINGS
May 26, 2006

THE HONORABLE IRA J. UHRIG, JUDGE

LAURA PORTER, CSR
OFFICIAL COURT REPORTER
WHATCOM COUNTY SUPERIOR COURT
BELLINGHAM, WASHINGTON
REPORTER'S TRANSCRIPT

BE IT REMEMBERED THAT on May 26, 2006, the above-entitled and numbered cause came regularly on for hearing before the Honorable IRA J.

UHRIG, Judge of the above-entitled court, sitting in Department 1 thereof, of the Whatcom County Superior Court, in the City of Bellingham, County of Whatcom, State of Washington;

The plaintiff appeared through MR. CRAIG CHAMBERS, Deputy Prosecuting Attorney for Whatcom County;

The defendant appeared through MR. WILLIAM JOHNSTON, Attorney at Law, Bellingham, Washington;

BOTH sides having announced they were ready for hearing, the following proceedings occurred, to wit:

- o 0 o -

MAY 26, 2007

- o 0 o -

...

(Argument continues with the following portion being requested)

THE COURT: We won't address the, what is to me the more interesting and larger issue, um, it doesn't come up. But, and in England the office of sheriff being appointed by the sovereign, historically is both judicial and administerial, whereas in the United States it's primarily administerial. And very little remnant of the old English tradition of a quasi judicial function. The office of sheriff remains. So that the historical basis of such a statute is probably seen in one of the last vestiges of the quasi judicial aspect of the office of sheriff as the -- as that office exists in England.

I have reviewed all the documents and I am agreement with the position taken by Mr. Chambers in this regard. That we can sum it up in simple terms as a matter of election of remedies under

Smith versus Mount, so I would just refuse to grant the motion for summary judgment, declaratory judgment or whatever you want to call it.

.....

(Hearing is adjourned).

APPENDIX E

Current version, RCW 69.50.505 (5), (6), (7), (9), (10)
Seizure and forfeiture

Note: In earlier versions of the statute, subsection 5 was known as section (e).

(5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee, except where the seizing agency is a state agency as defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW 4.28.080 or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession.

The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020. A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture. The seizing law enforcement agency shall promptly return the article or articles to the claimant upon a determination by the administrative law judge or court that the claimant is the present lawful owner or is lawfully entitled to possession thereof of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section.

(6) In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

(7) When property is forfeited under this chapter the board or seizing law enforcement agency may:

(a) Retain it for official use or upon application by any law enforcement agency of this state release such property to such agency for the exclusive use of enforcing the provisions of this chapter;

(b) Sell that which is not required to be destroyed by law and which is not harmful to the public;

(c) Request the appropriate sheriff or director of public safety to take custody of the property and

remove it for disposition in accordance with law; or

(d) Forward it to the drug enforcement administration for disposition.

(Subsection (8) omitted)

(9) (a) By January 31st of each year, each seizing agency shall remit to the state treasurer an amount equal to ten percent of the net proceeds of any property forfeited during the preceding calendar year. Money remitted shall be deposited in the violence reduction and drug enforcement account under RCW 69.50.520.

(b) The net proceeds of forfeited property is the value of the forfeitable interest in the property after deducting the cost of satisfying any bona fide security interest to which the property is subject at the time of seizure; and in the case of sold property, after deducting the cost of sale, including reasonable fees or commissions paid to independent selling agents, and the cost of any valid landlord's claim for damages under subsection (15) of this section.

(c) The value of sold forfeited property is the sale price. The value of retained forfeited property is the fair market value of the property at the time of seizure, determined when possible by reference to an applicable commonly used index, such as the index used by the department of licensing for valuation of motor vehicles. A seizing agency may use, but need not use, an independent qualified appraiser to determine the value of retained property. If an appraiser is used, the value of the property appraised is net of the cost of the appraisal. The value of destroyed property and retained firearms or illegal property is zero.

(10) Forfeited property and net proceeds not required to be paid to the state treasurer shall be retained by

the seizing law enforcement agency exclusively for the expansion and improvement of controlled substances related law enforcement activity. Money retained under this section may not be used to supplant preexisting funding sources.

APPENDIX F

RCW 69.50.505(e) - 1982

(e)... The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee...

APPENDIX G

RCW 69.50.505(e) - 1981

(e)... The hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW...

APPENDIX H

RCW 69.50.505 (c), (e) - 1977

(c) In the event of seizure pursuant to subsection (b), proceedings for forfeiture shall be deemed commenced by the seizure. The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in charge thereof and any person having any known right or interest therein, of the seizure and intended forfeiture of the seized property. The notice may be served by any method authorized by law or court rule including but not limited to service by certified mail with return receipt requested. Service by mail shall be deemed complete upon mailing within the fifteen day period following the seizure.

(Subsection (d) omitted.)

(e) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (a)(4) of this section within forty-five days of the seizure, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction if the aggregate value of the article or articles involved is more than five hundred dollars. A hearing before the seizing agency and any appeal therefrom shall be under chapter 34.04 RCW. ...

APPENDIX I

RCW 69.50.505 (b), (c), (d) - 1971

(b) Property subject to forfeiture under this chapter may be seized by any board inspector or law enforcement officer of this state upon process issued by any superior court having jurisdiction over the property. Seizure without process may be made if:

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under and administrative inspection warrant.

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based on this chapter;

(3) a board inspector or law enforcement officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the board inspector or law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(c) In the event of a seizure pursuant to subsection (b), proceedings under subsection (d) shall be instituted promptly.

(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the board or seizing law enforcement agency subject only to the orders and decrees of the superior court having jurisdiction over the forfeiture proceedings. When property is seized under this chapter, the board or seizing law

enforcement agency may:

(1) place the property under seal,

(2) remove the property to a place designated by it; or

(3) request the appropriate sheriff or director of public safety to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

APPENDIX J

Partial Transcript of
SENATE STANDING COMMITTEE ON:
JUDICIARY
Held on
February 23, 1982

CHAIRMAN: Senator Clarke, the Committee Chairman is unable to be here today so I will be presiding. I'm Dick Hemstad, the vice-chairman. ...

(Hearing continues)

CHAIRMAN: I think I'm going to... take up at first ... House Bill 907, which is the Administrative Hearings Office bill. (Unintelligible). Would staff first describe the bill please?

MR. ARMSTRONG: Mr. Chairman, members of the Committee. House Bill 907 modifies the laws governing the Office of Administrative Hearings. ... If you want me to take a few minutes I can just run through these amendments very quickly...

(Hearing continues)

MR. ARMSTRONG: The third amendment deletes the local law enforcement agencies from the requirement of using the Administrative Law Judge when enforcing the Uniform Controlled Substance Act. The major reason for this amendment is that this is a local issue, a local agency; the Administrative Law Judge was set up to handle state agencies, and so for that reason the police departments and the Administrative Law Judge are in agreement that they probably should not be

included within the purview of this statute.

(Hearing continues)

CERTIFICATION RE TRANSCRIPT

I, **Maureen R. Johnston,** under penalty of perjury, do hereby declare and state as follows:

That during the month of April 2009, I contacted Lupita Lopez in the Office of the Washington State Archives. She provided me with Washington State House and Senate Bill files related to RCW 69.50.505. These included the files: 1971 SSB; 1977 ESB 2416; 1981 HB 101; 1982 HB 907; and 1982 HB 15. She also mailed me all available audiotapes of State House and Senate Committee hearings related to those bill files.

That I was able to understand and partially transcribe the tape labeled "Sen-Jud 2/23/82" at which HB 907 was discussed. Appendix J is an accurate partial transcript of the proceedings in the Washington State Senate Judiciary Committee.

Maureen R. Johnston
23 St. Mark's Place, #3
Brooklyn, New York
May 1, 2009

APPENDIX K

BILL No: SB 2416
SHORT TITLE: providing a forfeiture hearing before the seizing agency to a person whose property has been seized under the controlled substances act
SPONSORS: Senators Walgren, Woody, Clarke and Henry
COMMITTEE: Senate Judiciary
ANALYSIS AS OF: February 18, 1977

ISSUE: The Uniform Controlled Substances Act, Chapter 69.50 RCW, contains provisions for the seizure and forfeiture of various items used in illegal drug trafficing such as raw materials, equipment, containers, transporting vehicles, books, records, as well as the illegal substances themselves. These items may be seized without prior legal process in any one of four situations set out on page 2, lines 12 through 23 of the bill. Property which has been seized may then be subject to forfeiture although the statute is not clear as to how forfeiture is to take place. Once the property is forfeited, the law enforcement agency may retain it for use in enforcing the act (e.g., retain a vehicle for use by plainclothes officers), sell it or dispose of it in other appropriate ways.

The state supreme court has found various features of the seizure and forfeiture statutes violative of due process. The specific subsection which has been litigated has been RCW 69.50.505 (b)(4) which permits seizure and forfeiture without prior notice and hearing of property used or intended to be used in violation of the act. This subjection was first held unconstitutional in *Everett v. Slade,* 83 Wn 2d 80 (1973) because it did not provide for any notice

or opportunity for a hearing prior to the actual seizure. Subsequent to that decision, the U.S. Supreme Court upheld a Puerto Rico seizure and forfeiture statute which did not provide for notice and a hearing prior to the seizure. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 US 663 (1974). The Puerto Rico statute did, however, provide for notice and hearing prior to the actual forfeiture. Because the Washington statute does not even provide for notice and a hearing at that time, the state supreme court again held RCW 69.50.505 (b) (4) to be unconstitutional. *State v. Matheason,* 84 Wn 2d 130 (1974).

The state court decisions clearly indicate that the seizure and forfeiture provisions will not pass constitutional scrutiny until a pre-forfeiture notice and hearing requirement is added.

SUMMARY: The bill establishes forfeiture procedures which must be followed by the seizing agency when property has been seized without legal process under the Uniform Controlled Substances Act.

1. The seizing agency must give written notice to the owner or person in charge of the property or any person having any known right or interest in the property within 15 days of the seizure.

2. If service of notice is by mail it is completed upon mailing.

3. The person claiming the property must notify the agency in writing within 45 days of the seizure.

4. The claimant is entitled to a hearing on the claim before the seizing agency. The hearing and any appeal is conducted in accordance with the Washington Administrative Procedures Act.

5. The claimant can have the hearing removed to the state court if the aggregate value of the property exceeds $500.00.

6. The claimant has the burden of producing evidence in support of the claim.

7. If competing claimants are involved, the prevailing claimant is entitled to costs and attorneys' fees.

STAFF COMMENT: There may be due process problems with having the forfeiture hearing held before the chief law enforcement officer of the seizing agency. The Puerto Rico forfeiture statute before the U.S. Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co., Supra,* provided for a court hearing on the forfeiture at the request of the claimant.

The bill would permit the hearing to be held before a court but only if the property is worth more than $500.00.

No. 08-1366

Supreme Court, U.S.
FILED
JUL 2 3 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN P.W. ROSCH,

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Washington, Division 1

RESPONDENT'S BRIEF IN OPPOSITION

DAVID S. MCEACHRAN
(Counsel of Record)
Whatcom County
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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether electing to pursue the administrative process in a forfeiture matter after being informed of the option to pursue the matter in a court of competent jurisdiction waives a due process challenge to the impartiality of the adjudicator of the administrative forfeiture hearing.

2. Whether an administrative forfeiture proceeding adjudicated by a sheriff's designee violates due process because the sheriff is permitted by state statute to keep the property or ninety percent of the proceeds from its sale where the designee's salary is not dependent on the outcome of the hearing, the proceeds are deposited into a fund administered by the county prosecutor and any expenditures are approved by the superior court.

3. Whether a claim that Washington's forfeiture statute violates the separation of powers doctrine because it permits the seizing agency to adjudicate the administrative hearing presents a federal question.

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JURISDICTION

Petitioner Rosch cites 28 U.S.C. §1257 as the basis for this Court's jurisdiction. In order for a federal claim to be properly asserted under 28 U.S.C. §1257, the claim must have been "specially set up or claimed under the Constitution or treaties . . . of the United States." 28 U.S.C. §1257(a). While Rosch asserts that all his issues arise under the United States Constitution, his separation of powers claim regarding Washington's forfeiture statute does not present a federal question.

STATEMENT OF THE CASE

On July 12, 2005,[1] a Chevrolet pickup truck was seized by members of the Northwest Regional Drug Task Force. Memorandum in Opposition to Motion for Summary Judgment at 2, Ex. 1. Rosch was provided with notice of the seizure and the intention of the Whatcom County Sheriff to forfeit the vehicle. Id. The notice advised Rosch that he was entitled to a reasonable opportunity to assert his claim of ownership before Sheriff William Elfo or the Sheriff's designee. He was also advised that he had the option of removing the matter to a court of competent jurisdiction for resolution and that the administrative

[1] The Court of Appeals opinion states that the truck was seized on the 13th, however the forfeiture notice sent to Rosch stated it was the 12th.

hearing and any appeal therefrom would be in accord with Washington's Administrative Procedures Act. Attached to the notice was a copy of Washington's forfeiture statute, RCW 69.50.505. Id.

On September 22, 2005 Rosch represented himself at the hearing before the Undersheriff for Whatcom County, Sheriff Elfo's designee. Memorandum in Opposition at 2. Testimony at the hearing showed that at least one of the controlled substance transactions in which the truck had been used predated the July 6, 2005 date when Rosch became the registered owner of the vehicle. The Undersheriff decided that the vehicle was forfeited as of the date it was used to facilitate a controlled substance transaction and that there had been no ownership interest in the vehicle to transfer to Rosch. Petitioner's claim of ownership was therefore denied. Id.

On October 17, 2005 Rosch filed a petition for judicial review of the Undersheriff's decision and later amended the pleading to add a Uniform Declaratory Judgment Act claim. At summary judgment the State did not contest the return of Rosch's truck, but asserted that Rosch's declaratory judgment claim should be denied. Memorandum in Opposition. The trial court granted the petition for judicial review and ordered the truck returned to Rosch, but denied his declaratory judgment claim and associated attorney's fees. August 4, 2006 Order at 2.

Rosch's declaratory judgment claim was premised upon the unconstitutionality of Washington's

forfeiture statute as applied within Whatcom County. Under Whatcom County's procedure, the Supervisor of the Northwest Regional Drug Task Force handles the forfeitures of seized assets as well as currency. Memorandum in Opposition Ex. 3. He deposits forfeited currency and proceeds of forfeited property into the Whatcom County Drug Fund, which fund is administered by the Whatcom County Prosecutor. Expenditures from the fund are initiated by motion of the Prosecutor and occur only with the approval of the Whatcom County Superior Court, via an order. Id. Expenditures from the Drug Fund are strictly in accord with those authorized in RCW 69.50.505(10). Id.

The Whatcom County Sheriff's Office does not have any direct access to the fund. Id. Monies from the fund have been allocated to the Whatcom County Sheriff's Office as reimbursement for employees hired as replacements for officers assigned to the Northwest Regional Drug Task Force in accord with RCW 69.50.505(10). Id. Such expenditures represented only a small fraction in 2006, 2.3 percent, of the entire budget of the Whatcom County Sheriff. Id.

REASONS WHY THE PETITION SHOULD BE DENIED

Rosch asserts that Washington's forfeiture law, RCW 69.50.505, violates due process under the 5th and 14th Amendments because of an alleged

pecuniary interest of the law enforcement officer adjudicating the forfeiture hearing. The statute, however, provides a claimant the option to remove a forfeiture matter to a court of competent jurisdiction, and Rosch was specifically informed of this option prior to deciding to proceed with an administrative hearing on the matter. Rosch's election of an administrative remedy waived his current constitutional challenges to the administrative process. If Rosch had desired the full due process protections afforded by the United States Constitution, Rosch could have chosen to pursue his claim in court. The Court of Appeals correctly decided that Rosch waived his constitutional challenges to the administrative process by choosing to pursue that more informal remedy over the judicial process.

In challenging the constitutionality of Washington's forfeiture statute on due process grounds before this Court, Rosch neglects to mention the specifics of the forfeiture procedures in Whatcom County. While the Sheriff does, and did, designate a deputy within the Sheriff's Office to adjudicate the forfeiture hearings, the proceeds from the sale of any forfeited property are deposited into the Whatcom County Drug Fund, a fund administered by the Whatcom County Prosecutor. Any expenditures from the Drug Fund must be approved by the Whatcom County Superior Court. The administrative process followed in Whatcom County clearly falls within circumstances that do not implicate due process concerns under this Court's precedent in *Dugan v. State of*

Ohio, 277 U.S. 61 (1928). Under Whatcom County's procedures any indirect pecuniary interest the Undersheriff may have is too attenuated to render the forfeiture statute as applied in Rosch's case unconstitutional.

Rosch also asserts a separation of powers claim citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). However, as Rosch's claim is based on application of a state statute, it does not raise a federal question. *Coolidge* is predicated on search warrants issued pursuant to the Fourth Amendment. This case does not involve the issuance of a search warrant. Therefore, *Coolidge* does not apply to Whatcom County's administrative forfeiture process and does not provide a basis for granting certiorari.

1. Rosch's election to pursue an administrative remedy over a judicial process waived his constitutional challenge to Whatcom County's administrative forfeiture hearing process.

Rosch asserts that the provisions in RCW 69.50.505 allowing for the seizing law enforcement agency to benefit from the forfeiture as well as to adjudicate the administrative forfeiture proceeding violates due process under the 5th and 14th Amendments to the United States Constitution. The trial court and the Court of Appeals ultimately found that Rosch had waived his constitutional challenges by electing to pursue the administrative hearing process

over the judicial process based on the Washington case of *In Re the Application of Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961). Rosch asserts that the *Borchert* decision is wrong, based on the Ninth Circuit case of *Gete v. Immigration and Naturalization Service*, 121 F.3d 1285 (9th Cir. 1997). In the *Gete* case it was the utter lack of any procedural safeguards within the Immigration and Naturalization Service ("INS") administrative process that led the court not to apply the doctrine of waiver. The *Gete* case acknowledged that generally when one elects an administrative remedy, they may not later claim that they have been unlawfully deprived of the safeguards associated with proceeding judicially. Id. at 1294. Rosch's election of an administrative remedy, one that is governed by Washington's Administrative Procedures Act, plainly falls within the doctrine of waiver. The Court of Appeals did not err in finding that Rosch had waived his constitutional challenges to the administrative procedures.

It is well settled that constitutional rights may be forfeited and/or specifically waived in both the criminal as well as civil context. For certain fundamental rights, *e.g.*, the right to counsel, waiver requires the intentional relinquishment or abandonment of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). For other non-fundamental rights, failure to assert the right forfeits or waives the right. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring). Expressly consenting to one tribunal over another can

waive constitutional challenges to the tribunal chosen. *See*, *Freytag*, 501 U.S. at 893-901 (Scalia, J. concurring) (petitioner's express consent to a special trial judge instead of a Tax Court judge waived right to challenge the appointment of the special trial judge on constitutional grounds);[2] *cf.*, *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (defendant's election for execution by lethal gas, where he was provided option of lethal injection, waived his constitutional objection to execution by lethal gas). Along the same lines, *Borchert* held that the defendant's election to proceed with his case before a justice of the peace compensated on a fee basis by statute, when he had expressly been given the option to change venue to a salaried judge, constituted a knowing and intelligent waiver of any possible bias arising from the statutory compensation scheme. *Borchert*, 57 Wn.2d at 725-26.

Rosch relies upon *Gete*'s rejection of a waiver analysis under the facts of that case to assert that his election here did not waive his due process claim. The Court of Appeals distinguished *Borchert* from *Gete* on the grounds that the fee justice system at issue in *Borchert* provided sufficient safeguards against bias or prejudice, while there were no safeguards in the administrative process against arbitrary or clearly unconstitutional actions in *Gete*.

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[2] Despite the waiver argument, the majority concluded that the case was "one of those rare cases" in which they should exercise the Court's discretion to hear a nonjurisdictional constitutional claim. *Freytag*, 501 U.S. at 878-79.

Petitioner's Appendix A at 11-A. Likewise, the forfeiture procedures utilized in Rosch's case are distinguishable from those condemned in *Gete*. In *Gete*, the court found that the administrative review process occurred "under procedures lacking all semblance of due process." *Gete*, 121 F.3d at 1287. Under the INS administrative process, all the claimant was entitled to was an interview with an immigration official who decided whether the government lacked probable cause to seize the property or if the owner had proved that the property was not subject to forfeiture under the law. Id. at 1290. The review of the immigration official's decision did not include a review of the probable cause determination and the process did not allow for any judicial review of the INS forfeiture decision. Id. The court was also concerned the claimants had not been notified that they would be waiving all of their rights under the Constitution and subjecting themselves to a process that might not even be minimally fair. Id. at 1294.

Here, in addition to providing the right of removal to a judicial setting, Washington's forfeiture statute provides for an administrative hearing and appeal conducted in accord with Washington's Administrative Procedures Act under Title 34. RCW 69.50.505(5). By choosing the administrative remedy here, Rosch did not unwittingly waive all of his constitutional rights or agree to a process that was "not even minimally fair." The administrative procedures here were and are "reasonable procedures" to provide a claimant with a reasonable opportunity to

be heard, all that is required to meet due process in the administrative hearing context. *Gete*, 121 F.3d at 1297.

Rosch was informed of his option to remove the forfeiture proceeding to a court of competent jurisdiction and was provided a copy of the statute setting forth the State's forfeiture process. Rosch's decision to choose an administrative process that he argues was inherently biased, with knowledge of his option to proceed in a court of law, waived his due process challenge to the administrative process.

2. The Whatcom County Sheriff's forfeiture procedure is constitutional under *Dugan v. State of Ohio*.

Rosch claims that Washington's forfeiture statute violates due process because of the pecuniary interest the statutory scheme creates for the adjudicator of the administrative hearing. Rosch does not assert actual bias, but an indirect pecuniary benefit that violates due process under *Connally v. Georgia*, 429 U.S. 245 (1977) and *Ward v. Monroeville*, 409 U.S. 57 (1972). *Connally* is not relevant as it involved an issue of direct pecuniary benefit to the adjudicator. The Whatcom County administrative forfeiture process is also distinguishable from the facts in *Ward* because any indirect pecuniary benefit is insubstantial and too remote as to violate due process.

The Due Process Clause of the United States Constitution requires disqualification of judges in two

instances, one where the judge has a personal financial interest in the outcome of the proceeding and the other involving criminal contempt cases. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2259-61 (2009). The Court in *Caperton* extended this due process concern to circumstances where there was no demonstration of actual bias but allegations of conflict of interest resulting from financial incentives. In *Caperton* the court found that the "extreme facts" of that case, involving substantial contributions from a party appearing before the judge to that judge's election campaign and the apparent effect they had on the outcome of the election, posed a "serious risk of actual bias." Id. at 2263-64. As noted by the dissent in that case, however, not all issues of judicial disqualification implicate United States Constitutional concerns. Id. at 2268 (Roberts, J. dissenting).

Officials assigned the duties of adjudication are presumed to be unbiased. *Withrow v. Larkin*, 421 U.S. 35, 47, 55 (1975). The mere fact that an adjudicative body derives a financial benefit from the penalties it imposes does not violate due process. *Van Harken v. City of Chicago,* 103 F.3d 1346, 1353 (7th Cir. 1997), *cert. denied*, 520 U.S. 1241 (1997), *citing Dugan v. Ohio*, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed.2d 784 (1928); *accord*, *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996).

Rosch relies upon *Connally v. Georgia*, 429 U.S. 245 (1977) and *Ward v. Monroeville,* 409 U.S. 57 (1972), for his claim that the Whatcom County Sheriff's Office administrative process violates due

process. In *Connally*, the justice of the peace was entitled to a fee when he approved a warrant application but received no compensation when he reviewed and denied one. *Connally*, 429 U.S. at 246. It was the direct, personal, and substantial pecuniary interest of the judge in the outcome of his decision that rendered the procedure unconstitutional. Id. at 250. Here, however, there is no question that the Undersheriff does not personally, nor directly, receive any financial benefit from his decision in the forfeiture hearing. Thus, the circumstances in *Connally* are distinguishable from the Whatcom County administrative hearing procedures.

In *Ward v. Monroeville*, the fines, fees and costs imposed for the offenses adjudicated in the traffic court presided over by the village mayor represented a major source of income for the village, between 35 and 50 percent of the village's income for the period considered. *Ward*, 409 U.S. at 58. In finding a due process violation, the court found that the mayor's executive responsibilities for village finances were such that they could make him partisan in order "to maintain the high level of contribution from the mayor's court." Id. at 60.

Unlike the mayor in *Ward* the Undersheriff's relationship to the pecuniary interest is too remote to warrant a presumption of bias. The Whatcom County Sheriff does not directly receive the proceeds from the sale of forfeited property. All of the proceeds are deposited into the Whatcom County Drug Fund. The Sheriff has no executive responsibilities for or over

the fund, which is administered by the Whatcom County Prosecutor. The Whatcom County Sheriff, let alone the Undersheriff, does not have independent access to the Drug Fund, nor is it an account within the general budget of the Whatcom County Sheriff. Expenditures are only made with the approval of the Whatcom County Superior Court. Any expenditures from the Drug Fund to the Sheriff are mainly to provide reimbursement for employees hired as replacements for Sheriff personnel deployed to the Northwest Regional Drug Task Force. Moreover, the amount of funds the Sheriff's Office receives through the Drug Fund is not a significant portion of the Sheriff's budget, 2.3 percent in 2006, nowhere near the 35 to 50 percent at issue in *Ward*. The Undersheriff does not have any of the wide ranging executive powers that warranted a presumption of partisanship in *Ward*.

The procedure utilized in Whatcom County is more analogous to and clearly constitutional under *Dugan v. State of Ohio*, 277 U.S. 61 (1928). In *Dugan* the defendant, claimed that the mayor court system there was unconstitutional because half of the fines imposed from convictions found by the mayor were paid into the city treasury. Id. at 62. However, unlike the mayor in *Ward*, the mayor had no executive functions and was but one of five commissioners exercising legislative power for the city. Id. at 63. The mayor received no fees from the convictions and his salary was set by the other members of the commission. In concluding that there was no due

process violation, the court emphasized that the mayor's salary was not dependent upon whether or not he convicted defendants. Id. at 65. Although the mayor's salary was paid out of the fund into which the fines from the mayor's court were paid, it was a general fund and the mayor had no executive authority over it. Id. The court found the mayor's relationship to the fund too remote to constitute a due process violation. Id.

Here, the Undersheriff's connection to the forfeited funds is too remote to implicate due process concerns. As in *Dugan*, the Undersheriff receives a salary no matter what his decisions are in the administrative forfeiture hearings. His salary isn't even paid out of the fund into which the proceeds of the forfeitures are paid. The Undersheriff also has no direct control over the expenditure of funds from the Drug Fund, neither does the Sheriff. The Undersheriff's relationship to the forfeiture proceeds is even more remote than that in *Dugan*. *See also*, *Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997) (where Board was both adjudicator and executor of its finances, a financial incentive of upwards of five percent of its budget in the outcome of adjudications was not a sufficiently strong institutional motive to reasonably warrant fear of partisan influence on the judgment); *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996) (fact that legislature earmarked funds received from fines imposed by judges for judicial facilities did not create

an interest that violated due process where judges did not have responsibility for or control over the Judicial Building Fund); *Agomo v. Fenty*, 916 A.2d 181 (D.C. 2007) (where there was no evidence that hearing examiners' salaries were contingent upon findings of liability or that their salaries were affected by the District's budget, no due process violation based on alleged pecuniary interest).

The actual administrative procedures applied in Whatcom County for forfeitures comply with due process. The adjudicator, the Undersheriff, has no direct pecuniary interest in the administrative hearing, and any indirect pecuniary interest is too remote under *Dugan* to implicate due process.

3. Rosch's separation of powers issue under *Coolidge v. New Hampshire* does not raise a federal question.

Rosch asserts that the forfeiture statute also violates the separation of powers doctrine. The combination of the Undersheriff's adjudicatory and investigatory functions regarding forfeitures has been held not to violate the separation of powers under the Washington cases of *Smith v. Mount*, 45 Wn. App. 623, 726 P.2d 474, *rev. denied*, 107 Wn.2d 1016 (1986) and *Lowery v. Nelson*, 43 Wn. App. 747, 719 P.2d 594, *rev. denied*, 106 Wn.2d 1013 (1986). Rosch relies on *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) for his separation of powers argument, however, *Coolidge* addresses the validity of a search warrant issued by a

non-neutral magistrate under the Fourth Amendment. *Coolidge* does not provide a basis for overruling *Smith* and *Lowery* as settled precedent in Washington. While Rosch now separately references the Fourth Amendment as a basis for finding Washington's forfeiture statute unconstitutional in this regard, he did not assert that theory below and the Fourth Amendment does not contain any separation of powers provision applicable to the states. Rosch's separation of powers issue derives from state law and does not raise a federal question.

The separation of powers doctrine under the United States Constitution does not extend to the states.

> "A local statute investing a collection of persons not of the judicial department, with powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the 14th Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way

> or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty."

Dreyer v. People of State of Illinois, 187 U.S. 71, 83-84 (1902); *see also*, *Consolidated Rendering Company v. State of Vermont*, 207 U.S. 541, 552 (1908) ("There is no provision in the Federal Constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon non-judicial bodies certain functions that may be called judicial."). Furthermore, in a federal setting this Court has acknowledged that the combination of adjudicatory and nonadjudicatory functions, without more, does not create an unconstitutional risk of bias necessarily resulting in a due process violation. *Withrow v. Larkin*, 421 U.S. at 47, 58. The United States Constitution does not proscribe how states may divide powers amongst their branches of government.

Rosch seeks to avoid the result dictated by *Smith* and *Lowery* by relying on selected language from the case of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). He analogizes the situation of the sheriff's office adjudicating a forfeiture claim to *Coolidge* where an attorney general acting as a justice of the peace authorized search warrants in a case in which he had been actively involved in the investigation and which he ultimately prosecuted. The warrants were determined to be invalid under the

Fourth Amendment because they had not been issued by a neutral magistrate. Id. at 449-50, 453. The issue here does not involve the issuance of a search warrant, but determination of a forfeiture claim. *Coolidge* is certainly not controlling precedent to the administrative proceedings in this case.

The United States Constitution does not govern, through the separation of powers doctrine, how states may divide functions among the three entities of government. *Coolidge* is a case limited to Fourth Amendment concerns regarding the issuance of search warrants by neutral magistrates and does not extend to adjudications in other settings. Rosch's separation of powers issue does not present a federal question, and Washington precedent is determinative of this issue.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

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In the
SUPREME COURT of the UNITED STATES

JOHN P.W. ROSCH
Petitioner,

v.

WHATCOM COUNTY, WASHINGTON,
Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals of the State of Washington

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of this Court, Petitioner John P.W. Rosch files this supplemental brief to address the Court's recent ruling in *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____ WL 1576573 (2009) which is relevant to the disposition of his petition for a writ of certiorari.

1. *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____ (2009) is the Court's most recent application of the Due Process Clause to prohibit economic incentives from influencing judicial decision making. Mr. Rosch's petition for a writ of certiorari should be granted here because, like in *Caperton*, his case presents a situation where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton*, slip op. at 1 (quoting *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

The Court again recognized in *Caperton* that "a fair trial in a fair tribunal is a basic requirement of due process." *Caperton*, slip op. at 6 (quoting *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed 942 (1955). Rosch, like *Caperton*, found himself before a decisionmaker who had a financial interest that would tempt him to disregard neutrality. The Washington forfeiture statute lets the sheriff's department keep the vehicles he declares forfeit, or retain 90% of their value if they are sold. This ensures that in *every* case that comes before the sheriff, there is a great temptation "not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927),

quoted in *Caperton,* slip op. at 16.

2. Granting certiorari in this case would not implicate the concerns of Chief Justice Roberts and Justice Scalia described in their dissents in *Caperton*. Rosch does not present a claim of unconstitutional bias reflected in particular facts alleged to be extreme. Rather, the unconstitutional bias in this case exists on a systematic level. The Washington statute challenged by petitioner Rosch ensures that every decision the sheriff makes to forfeit property offends the due process protection against a financially interested adjudicator.

Moreover, the safeguard relied upon by Chief Justice Roberts in his dissent in *Caperton* is not present. "All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise." *Caperton,* slip op. at 2 (ROBERTS, C. J., dissenting). The sheriffs who adjudicate forfeitures in Washington have not taken such an oath; they are not governed by the state code of judicial conduct; and they do not possess the education, experience or expertise to act as judges, but the Washington legislature has given them judicial power anyway.

RCW 69.50.505 gives the sheriff, as the chief law enforcement officer of the seizing agency, the authority to adjudicate the forfeiture of personal property. His department benefits financially from a decision to forfeit. If he dismisses the forfeiture proceeding for lack of merit, his department receives nothing. If he declares the item forfeit, the sheriff may either retain the forfeited property for

official use or else sell it and retain 90% of the net proceeds. RCW 69.50.505(7), Pet. Appendix E, 18-A.

This substantial incentive places a thumb on the scales on the side of forfeiture in *every* case. Such a significant temptation renders the sheriff unfit to act as judge under the Due Process Clause as well as under *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

3. *Caperton* demonstrates that the due process concern with conflicts resulting from financial incentives is not limited to "the traditional common-law prohibition on direct pecuniary interest." *Caperton*, slip op. at 7-8. The adjudicator need not have his personal income augmented in order for the principle to apply; rather, the question whether due process is offended turns on the possible temptation the adjudicator may face. *Caperton*, slip op. at 8-9, citing *Ward v. Monroeville*, 409 U.S. 57,60 (1972).

The sheriff's court of Whatcom County has jurisdiction over the forfeiture of a wide range of property and currency. The underlying record in this case demonstrates that in Whatcom County the amount derived from forfeitures was $330.961.06 in 2005; $99,730.20 in 2004; and $859.124.45 in 2003. These are not trifling sums and the sheriff's interest in them is not remote. Petitioner Rosch's 2001 Chevrolet pickup truck had a value of approximately $15,000. Had the sheriff's ruling not been overturned in superior court, the forfeiture would have resulted in substantial loss to Rosch and substantial gain to the sheriff's office. As the underlying record demonstrates, the sheriff has

ordered forfeiture of items of personal property having even greater value. For example, one item forfeited in 2005 had a value of $17,750.00. In 2004 one item had a value of $34,750.00. In 2003 the sheriff's office reported one forfeiture of just $12.00 and another single forfeiture of $14,300.00. It is unlikely that the village mayors in *Tumey* and *Monroeville* ever imposed such a fine in any single case. There as here, the problem was the existence of a system that gave the decision maker a motive to make decisions that would help with the financial needs of the municipality. That the sheriff can obtain such large sums for his department by virtue of a single forfeiture decision only makes the problem worse. Like *Tumey*, *Monroeville*, and most recently *Caperton*, this case calls out for enforcement of the Due Process Clause.

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice clear and true between the State and the accused denies the latter due process of law.

Tumey, 273 U.S. at 532.

CONCLUSION

Following *Caperton* and the line of cases cited therein, this Court should grant Rosch's petition for certiorari and enforce the Due Process Clause. The State has created a tribunal for the adjudication of property rights that is systematically incapable of

applying the law impartially. It will continue unless this Court acts. The sheriff's court created by RCW 69.50.505 is a constitutionally defective system for adjudicating property rights and it cannot be salvaged through the offer of a judicial alternative. Rosch is entitled to a declaration that the statute is unconstitutional and to an award of attorney fees and costs under 42 U.S.C. §§ 1983 and 1988.

Respectfully submitted.

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(4)

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Petitioner John P.W. Rosch makes the following reply to Respondent's Brief in Opposition to show that he did not waive his constitutional challenge; that the sheriff has a direct substantial interest in the outcome of a forfeiture hearing; and that Washington courts have acted contrary to *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L. Ed.2d 564 (1971) by authorizing a law enforcement officer to exercise judicial power in a quasi-criminal matter.

I. Rosch did not waive his constitutional challenge.

The notice of forfeiture sent by the sheriff advised Rosch that he was entitled to "a reasonable opportunity to be heard" as to a claim of ownership or right of possession.

> The hearing shall be before William J. Elfo, the chief law enforcement officer of Whatcom County, Washington, or his designate, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction if the aggregate value of the article or articles seized is more than five hundred dollars ($500). A hearing before said chief law enforcement officer and any appeal therefrom shall be under chapter 34.04 RCW.

Notice of Seizure and Forfeiture, July 12, 2005.

Washington courts hold that Rosch waived his due process challenge when he chose to proceed in the sheriff's court instead of exercising the removal option. They have steadfastly refused to decide whether the sheriff's court can withstand scrutiny under the Due Process Clause.

The first case Whatcom County cites to support waiver, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), actually shows why there was no waiver in this case. In *Freytag*, the Chief Judge of the United States Tax Court assigned a "special trial judge" to hear the petitioners' case. The special judge disallowed petitioners' claimed deductions. On appeal, petitioners argued that the appointment of the special judge was invalid under the Appointments Clause. The Court of Appeals concluded that petitioners had waived this constitutional challenge by going to trial before the special judge. *Freytag*, 501 U.S. at 872. The majority opinion for this Court, however, decided on the merits that there was no violation of the Appointments Clause. Similarly here, the constitutional defect alleged by Rosch should be thoroughly reviewed and a decision reached on the merits whether or not Washington's unique forfeiture court comports with due process.

Justice Scalia's concurring opinion would have held that that the *Freytag* petitioners waived their constitutional challenge. But his analysis supports Rosch in the present case. He recognized that an unlawful proceeding cannot be legitimized by consent when the defect goes "to the validity of the very proceeding under review". *Freytag*, 501 U.S. at

898 (SCALIA, J., concurring). To ignore Rosch's due process argument on the basis of waiver gives the purported waiver a legitimating effect upon an illegitimate system. Whenever the sheriff's decision to forfeit is appealed to the courts of Washington, under the statute their review is deferential rather than de novo. It is an affront to legitimate courts to require them to accept findings of fact that are supported by substantial evidence in the record, where the decisionmaker who made the findings is acting as a judge in his own case. Certiorari should be granted to protect the integrity of the court.

The second case Whatcom County cites for waiver is *Stewart v. LaGrand*, 526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999). Mr. LaGrand chose to be executed by lethal gas rather than lethal injection with full knowledge and advice of counsel concerning the import of that choice, and after the governor offered him an opportunity to rescind his decision and select lethal injection, and at no cost to himself if he chose lethal injection. The Court held that he thereby waived the right to challenge the constitutionality of execution by lethal gas. *Stewart*, 526 U.S. at 119. *Stewart* is factually and procedurally remote as it does not involve a challenge to the legitimacy of a tribunal. An uncounseled election to participate in a hearing before a systematically biased judge does not meet the standard for waiver of a fundamental right. *See Gete v. Immigration and Naturalization Service*, 121 F.3d 1285, 1294 (9th Cir. 1997).

Under the Due Process Clause, judicial power must be exercised by an impartial decisionmaker from the very beginning. *Ward v. Monroeville,* 409 U.S. 57, 61-62, 93 S.Ct. 80, 34 L.Ed.2d 267 ("Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.")

The fundamental importance of an unbiased decisionmaker is underscored by *North v. Russell,* 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976). There, this Court upheld against a due process challenge a Kentucky two-tier trial court system for misdemeanors, with lay judicial officers in the first tier in smaller cities and an appeal of right with a de novo trial before a traditionally law-trained judge in the second. *North*, 427 U.S. at 339. The Court explained that the use of a nonjudicial officer as judge did not violate *Ward* unless it created the potential for bias. "Our concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgment, not at legal training." *North*, 427 U.S. at 337, also citing, *inter alia*, *Coolidge v. New Hampshire*, 403 U.S. at 449-453.

The Washington statute does not require the sheriff or his designee to be law-trained, but Rosch does not attack the sheriff's court on that basis. As *North* indicates, unfamiliarity with the law is a lesser flaw compared to the problem of systemic bias.

This Court should reject the application of the waiver principle by which Washington's appellate courts have long avoided confronting the fundamental unfairness of allowing an interested law enforcement official to decide a forfeiture case.

II. The benefit to the sheriff is substantial, not attenuated as Whatcom County claims.

Whatcom County's brief inaccurately defines Rosch's declaratory judgment claim as "premised upon the unconstitutionality of Washington's forfeiture statute *as applied within Whatcom County*." Respondent's Brief in Opposition, pages 2-3 (emphasis added). Whatcom County then makes irrelevant assertions about how the statute is applied locally, apparently attempting to show that a local "administrative process" has cured the deficiencies in the statute. See Respondent's Brief in Opposition at 4-5, 9-14.

Whatcom County cites no statute, ordinance or case that requires the sheriff to involve the prosecutor or the court in a process to decide who gets the proceeds of forfeiture. If the Whatcom County Sheriff has volunteered to share his power at present, he has created only a veneer of neutrality. Nothing prevents the sheriff from reverting at any time to his statutory authority to retain the forfeited property "for official use" or sell it and keep 90% of the proceeds, without the intermediation or approval of any other entity. It is this statutory authority that gives the sheriff as a seizing agency a direct and unattenuated institutional interest in forfeited assets and proceeds. The superior court and the appellate courts of Washington have not mentioned

local practice as a basis for upholding RCW 69.50.505. They have recognized Rosch's challenge as a challenge to the statute on its face and that is what it is.

Whatcom County does not dispute Rosch's historical point that the reforms of Henry I and Henry II presaged the modern due process requirement for an impartial decisionmaker. And Whatcom County does not dispute that Washington State is the only State with a forfeiture hearing process in which the chief law enforcement officer of the seizing agency is the adjudicator. The sheriff who adjudicates forfeiture hearings under RCW 69.50.505 may hear any case that he initiates, whether it involves a forfeiture of $12.00 or $1.2 million. Whatcom County attempts to disguise the interest of the sheriff by emphasizing that it was his designee, the undersheriff, who actually conducted the forfeiture hearing in Rosch's case. This is a distinction without a difference. Again, it is not necessary under the statute that the sheriff designate someone other than himself; and even if it were, there is no reason to believe that the undersheriff—who serves at the pleasure of the sheriff—is less subject to the temptations of forfeiture than the sheriff himself would be.

The temptation is systemic under the statute. This situation is governed by *Ward*, not—as Whatcom County argues—by *Dugan v. Ohio*, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928). In *Dugan*, the mayor of the town had judicial functions but "only very limited executive authority," *Ward*, 409 U.S. at 60, whereas here the sheriff is the chief county law enforcement official, with full authority

to enforce the laws regarding controlled substances. Just as the Monroeville mayor's "executive responsibilities for village finances" could make him "partisan to maintain the high level of contribution from the mayor's court", *Ward*, 409 U.S. at 60, the sheriff's accountability for enforcement of drug laws gives him a direct interest in augmenting his budget with vehicles and cash and other forfeited items of personal property.

Whatcom County contends the sheriff's motive to augment his budget is de minimis, citing *Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997); *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996); and *Agomo v. Fenty*, 916 A.2d 181 (D.C. 2007) as authority for upholding Washington's statute. *Kaipat* and *Agomo* are not compelling because they address systems like the one in *Dugan*, in which the allegedly biased decisionmaker had only judicial duties, and no executive responsibilities. *Kaipat*, 94 F. 3d at 580-81; *Agomo*, 916 A. 2d at 196-97.

City of Berkeley is closer in that, as the court recognized at the outset, the Berkeley Rent Stabilization Board "wears two hats." *City of Berkeley*, 114 F. 3d at 842. The Board was collecting a per-unit fee of up to $130 from covered units to fund its annual expenses, and was also adjudicating disputes about which units were covered. Recognizing that this budgetary system gave the Board at least some incentive to find landlords covered, the court made the judgment that the incentive was not strong because the Board had the ability to recoup losses by raising fees; adjudications

of coverage issues were rare; and the Board regularly waived penalties and had recently run a surplus. *City of Berkeley*, 114 F. 3d at 847. Similar facts are not present here. And Washington's system has a feature not present in *City of Berkeley*, *Dugan*, and other cases involving relatively small fines or fees. The item forfeited by the sheriff in any single case may be extremely valuable, such as a vehicle that the sheriff's office can put to immediate official use, or such as the cash that may be obtained by selling it. Rosch's truck had a value of approximately $15,000 and it is not unusual for the sheriff to seize items of much greater value. Such a case presents a strong temptation to the decisionmaker to put the interests of law enforcement ahead of the rights of the claimant.

III. The Washington Court of Appeals decision conflicts with *Coolidge v. New Hampshire* by allowing a law enforcement official to exercise judicial power in a quasi-criminal matter.

Whatcom County misunderstands Rosch's *Coolidge* argument. Rosch is not asking this Court to make the separation of powers doctrine applicable to the states. Rosch made *Coolidge* the focus of a separate argument in his petition in order to show that the due process requirement of an impartial decision-maker is especially imperative when it is a law enforcement official who purports to act with judicial impartiality in a criminal or quasi-criminal matter. This Court recognized *Coolidge* as a due process precedent when citing it along with *Ward* in *North*, 427 U.S. at 337.

Whatcom County contends that *Coolidge* is irrelevant because the issue here does not involve the issuance of a search warrant. *Coolidge* cannot be so easily confined to its facts. There, the State argued that the Attorney General actually did act as a neutral and detached magistrate when he made a determination of probable cause and issued a search warrant, as a state law authorized him to do. To this proposition, the Court said,

> [I]t is enough to answer that there could hardly be a more appropriate setting than this for a per se rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise' that must rightly engage their single-minded attention.

Coolidge, 403 U.S. at 450.

Coolidge keeps all executive law enforcement officers out of the business of performing judicial functions in the criminal cases they are pursuing. Rosch argues that the bright line per se rule of disqualification in *Coolidge* should also apply to bar adjudication of forfeitures by law enforcement

officers. Forfeiture has been recognized as a criminal "plea of the crown" at least since the Assize of Clarendon (1166), which

> laid down the principle that persons indicted could be tried by the King alone, and that the forfeitures were his only. The indictment procedure therefore superseded *all local jurisdictions* both in the matter of trial and of profits.

Plucknett, Theodore Frank Thomas, "A Concise History of the Common Law (Fifth Edition)," at 428. Boston: Little, Brown and Company, 1956 (emphasis added).

The zenith of prosecutorial power is reached in cases in which the state carries on a criminal prosecution while it simultaneously seizes the accused's assets and subjects them to forfeiture. The purpose of the power of forfeiture is to punish the offender for his commission of the criminal act. That forfeiture proceedings are considered quasi criminal proceedings was established in *Boyd v. United States* 116 U.S. 616, 634, 6 S.Ct. 524 (1886); and that the exclusionary rule is binding upon the states under the Fourteenth Amendment was emphasized by the Court in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965):

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses

> committed by him, though they may be civil in form, are in their nature criminal... As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution.

One 1958 Plymouth Sedan, quoting *Boyd,* 380 U.S. at 697-98.

In cases involving forfeiture of personal property under the Washington statute, the seizing agency has the initial burden of showing probable cause to believe the seized items were the proceeds of or intended to be used in illegal drug activities. The adjudicator must then decide whether the agency has met that burden. *Valerio v. Lacey Police Department,* 110 Wash.App. 163, 176, 39 P.3d 332 (2002). It is fundamentally unfair to put the sheriff in the position of judging whether his own agency's evidence has met the standard for probable cause.

As this Court commented in *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367 (1948), and repeated in *Coolidge*:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in

> requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Coolidge v. New Hampshire, quoting *Johnson*, 403 U.S. at 449.

Just as the Attorney General in New Hampshire was barred from exercising judicial power to find probable cause to support the issuance of a search warrant, so too should the sheriff be barred from exercising judicial power to find probable cause to support the forfeiture of property. And this would be necessary even if the statute did not allow the sheriff to retain any of the forfeited assets or funds for official use. Thus, *Coolidge* supplies a basis for review that is distinct from *Ward*.

Rosch intends no personal disrespect to Whatcom County Sheriff Bill Elfo or to his designee. The point is, however, that forfeiture is a quasi-criminal proceeding that helps the sheriff accomplish the objectives of his law enforcement mission. He cannot reasonably be expected to be neutral and

detached. The sheriff's participation in the competitive enterprise of ferreting out crime is another reason, in addition to the financial interest created by the statute, why there should be a per se rule preventing him from adjudicating forfeitures under RCW 69.50.505.

Respectfully submitted.

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